No. 86-2041

Supreme Court, U.S.
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CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1986

EFFIE DELL CASSIDY, as guardian of the person of KENNETH CASSIDY, FLORIDA NATIONAL BANK, as guardian of the property of KENNETH CASSIDY, and SHARON CASSIDY, as wife of KENNETH CASSIDY,

Appellants,

v.

THE FIRESTONE TIRE & RUBBER COMPANY, a corporation, FORD MOTOR COMPANY, a corporation, and THE BUDD COMPANY, a corporation,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

JURISDICTIONAL REPLY BRIEF

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August 25, 1987

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APPELLANTS REQUEST THAT PAPERS SUBMITTED BE TREATED AS PETITION FOR WRIT OF CERTIORARI

The Substance of Appellants Jurisdictional Statement Renders It, Properly, a Petition for Writ of Certiorari Under 28 USC, Sec. 1257(3), Not an Appeal Under Sec. 1257(2).

Appellants acknowledge having by mistake submitted their cause to this Court as an appeal under 28 USC Sec. 1257(2) when, properly, it called for submission as a petition for writ of certiorari under Sec. 1257(3). Appellants jurisdictional statement is not intended to, nor does it in any way, draw in question any state statute. The true matter in which appellants appeal is grounded is clearly recognizable. That the federal ground of appellants cause to this Court clearly appears is attested to by appellees own statement of it:

> In essence, appellants assert the retroactive application of the Florida Supreme Court decision of *Pullum v. Cincinnati, Inc.,* 476 So.2d 657 (Fla. 1985) destroyed appellants property right in an accrued cause of action and thereby violated his federal due process rights under the Fourteenth Amendment to the United States Constitution. (Appellee The Budd Company's Brief, Page 8)

It cannot be shown that what appellants asserted in the state courts below ever was intended to, nor ever did, draw into question the validity of a state statute. Likewise, the matter presented in appellants jurisdictional statement in this Court does not draw into question "the validity of a statute" but presents a matter set to the requirements for consideration as a petition for writ of certiorari under 28 USC Sec. 1257(3). Accordingly, appellants ask that the Court, in the exercise of its discretion, treat the papers submitted by appellants as a petition for writ of certiorari. *Louisiana Public Service Comm. v. FCC, 467 U.S.*_____ 90 L.Ed. 2d 369, 378, 106 S.Ct. _____ (1986); *Renton v. Playhouse Theaters, U.S.*_____, 89 L.Ed. 2d 29, 35, 106 S.Ct. _____(1986); *Silkwood v. Kerr-McGee Corp.,* 404

U.S. 238, 78 L.Ed. 2d 443, 452, 104 S.Ct. 615 (1948); 28 USC Sec. 2103, *El Paso v. Simmons,* 379 U.S. 188, 13 L.Ed. 446, 451, 85 S.Ct. 577 (1965)

REPLY

I

Appellees Argument That Appellants Failed To Assert In The State Courts Below The Federal Issue Asserted To This Supreme Court of the United States in Appellants Jurisdictional Statement Is Unsupported And Flatly Rebutted By The Documented Facts Of The Matter.

Background of Reply to Appellees Contention

The sum and substance of the federal issue asserted throughout by appellants to the Florida State Court below spoke to the point that:

> Under provisions of the US Constitution and decisions of the US Supreme Court the property right of a citizen of the United States in his or her accrued cause of action is not to be destroyed by applying a change in the law retroactively to his or her cause of action which accrued before the law changed.

Documented Facts of Reply to Appellees Contention

1. *In the Florida Circuit Court:* Appellants brief to the Court in opposition to appellants motion for summary judgment stated:

> (T)he Supreme Court (referring to the U.S. Supreme Court) has consistently held that the taking of property or the denial of property rights in any of its varied forms without due process of law violates the Fifth Amendment of the U.S. Constitution. We submit that, on balance, the Florida Supreme Court would take this factor into account in any decision involving a question of retrospectivity/prospectivity stemming from *Pullum (Pullum v. Cincinnati, Inc.,* 476 So. 2d 657 (Fla. 1985)) **Appendix P. 2a**

As to property rights existing in causes of action appellants brief cited the language of cases, as follows:

> *Reid v. Solar Corporation,* 69 F. Supp. 626 (U.S. Dist. Ct. N.D. Iowa, 1946: "(E)xisting actions constitute 'property' within the meaning of the constitutional guarantees.", *Harco v. Southern Pac. R. Co.,* 62 P. 2d 443 (1 DCA Cal. 1936) "The right to recover damages for a personal injury, as well as the money recovered as damages, is property and may be regarded as a chose in action.", *Udall v. Mason,* 26 A. 2d 101 (Sup. Ct. Vt., 1942) "A vested right of action is property in the same sense that tangible things are property." **Appendix P. 2a**

2. *In the Florida District Court of Appeal:* Point I of appellants brief was hinged on the United States Supreme Court case of *Gelpcke v. City of Dubuque,* 1 Wall 175, 17 L.Ed. 520 (1863). The binding effect of *Gelpcke* in the Court's holding that rights existing prior to change of the law could not be destroyed by retroactively applying the changed law was set forth at the outset of appellants brief:

> In *Gelpcke* the Iowa Supreme Court first, in 1853 construed as constitutional a statute enacted by the Iowa legislature; then, some six years later, in 1859, construed the subject statute as unconstitutional. The Supreme Court held that the 1859 overruling decision could not be applied retroactively to its overruled 1853 decision.
>
> **Brief of Appellee The Budd Company, p. App. 9**

3. *Subsequent to The Filing of All Briefs in The Florida District Court of Appeal,* on June 13, 1986, the U.S. District Court, Northern District, Florida decided the case of *George v. Firestone Tire & Rubber Co.,* No. CGA 85-0117 (a case facsimile identical to appellants case), in which it was held that the decision of the Florida Supreme Court in *Pullum* could not be applied retroactively to bar plaintiff's action because to do so

would deprive plaintiff of a property right in his accrued cause of action which the Court stated:

> would plainly violate plaintiff's federal due process rights.

By way of supplemental authority appellants promptly communicated the subject case to the Florida District Court of Appeal.

4. *Thereafter on Oral Argument in the District Court of Appeal:* Appellant stressed and urged to the Court the decision of the Federal District Court in *George v. Firestone Tire & Rubber Co.*[1] respecting the protection afforded by the United States Constitution against retroactively depriving a person of the property right existing in his or her accrued cause of action. **Appendix P. 3a**

5. *In Appellants Motion to the District Court of Appeal for Rehearing,* joined in support by the Academy of Florida Trial Lawyers as Amicus Curiae, appellants urged:

> However, regardless of whether Appellants obtained a verdict or judgment, this Court failed to address the fact that Appellants' cause of action, when it accrued

---

[1]In its decision the District Court of Appeal denoted it acted with knowledgeable awareness of *George v. Firestone Tire & Rubber Co.*, communicated to the court by appellants as supplemental authority and urged to the court on oral argument by appellants in their assertion of the federal constitutional issue.

Footnote 3 of District Court of Appeal opinion.

Several cases in federal district court have addressed this issue with varying results. E.g. compare *Eddings v. Volkswagenwerk, A.G.*, 635 F. Supp. 45 (N.D. Fla. 1986), and *Lamb v. Volkswagenwerk Aktiengesellschaft,* 631 F.Supp. 1144 (S.D. Fla. 1986), with *George v. Firestone Tire and Rubber Co.*, Case No. CGA-85-0117-MMP (U.S. SCN Fla., June 13, 1986), and *Owens v. Firestone Tire and Rubber Co.*, Case No., 84-350-Civ-T-10 (U.S. D.C.M. Fla., Jan. 28, 1986) [Available on WESTLAW, DCTU Database]

in February of 1982, vested in the Appellants the right to prosecute this cause of action. This Court has overlooked the argument of the Academy that Appellants' cause of action is a chose in action which is vested property interest subject to constitutional protections under both the Florida and U.S. Constitutions.

This Court overlooked and/or failed to address the Academy's citation of *Martinez v. Fox Valley Bus Lines,* 17 F. Supp. 576 (N.D. Ill. 1936); *Gregory v. Colvin,* 363 S. W. 2d 539 (Ark. 1963); *Faucheaux v. Alton Ochsner Medical Foundations Hospital and Clinic,* 470 So.2d 878 (La. 1985); *Bush v. Reid,* 516 P. 2d 1215 (Alaska 1973); and *City of Cincinnati v. Hafer,* 49 Ohio St. 60, 30 N. E. 197 (1892) which support the position of Appellants and Amicus that the Appellants' cause of action is a vested property right which cannot constitutionally be vitiated without an alternative remedy or means of redress. **Appendix P. 5a**

6. *In the Florida State Supreme Court on Petition for Discretionary Review:* Appellants clearly asserted as the third ground of their petition that the decision of the District Court of Appeal violated appellants rights under the Fifth and Fourteenth Amendments of the United States Constitution. Appellants brief specified:

> Petitioners cause of action is a vested property right which cannot be taken away without being violative of the Fifth and Fourteenth Amendments of the U.S. Constitution. **Appendix P. 7a**

Appellants underpined its assertion with page references to the federal case of *George v. Firestone Tire & Rubber Company, supra* which, as before indicated, is facsimile identical to appellants case. As in its jurisdictional statement in the United States Supreme Court appellants incorporated in its brief a complete printing of its references to the subject case. (Full treatment of federal issue as set

forth in *George v. Firestone Tire & Rubber Co.,* asserted by appellants throughout, commences in the appendix of appellants jurisdictional statement at the bottom of page 20a, continuing to page 26a)

The facts of what transpired speak to the proof: *The ground of the federal issue asserted by appellants was brought to the attention of the Florida state courts below.* In *People of State of New York v. Zimmerman,* 278 US 63, 73 L.Ed. 184, 49 S. Ct. 61 (1928), this Court pointed out that if the record as a whole shows either expressly or by clear intendment that the ground of petitioner's claim was brought to the attention of the court with fair precision and in due time the claim is to be regarded as having been adequately presented.

Appellants respectfully submit to this United States Supreme Court, in light of the clear abundance of facts, appellees contention that appellants failed to assert the federal issue in the state courts below is unfounded, defies the facts, and should not be allowed because an acutely substantial federal issue needing to be passed upon is embodied in appellants petition as will next be demonstrated in this Reply.

II
CONTRARY TO APPELLEES CONTENTION THE FEDERAL ISSUE IS SUBSTANTIAL

Appellees briefs failed to respond or advert to what was shown in appellants jurisdictional statement to render substantial the question presented in appellants petition.

> The Courts of this nation are served whenever this Court acts to deal with a new or another not well recognized question of retroactivity. Such is appellant's case here where the decision of this Court will serve to give an answer in form of law and legal guideline whether one's property rights in his *accrued* cause of action is protected against the retroactive application of an overruling decision which changes the

law from what it was when his cause of action accrued and his property rights therein vested. What the decision of this Supreme Court of the United States will do to settle the federal questions involved renders it distinctively substantial.

The failure of appellees to speak to this point appears to flow from their failure to see the question of retroactivity as it applies to the facts of appellants case. The whole of appelles argument against appellants case on its merits and the substantiality of the federal question it involves readily appears in the following statement set forth in appellees brief:

> In essence, appellants assert that the retroactive application of the Florida Supreme Court decision of *Pullum v. Cincinnati, Inc.,* 476 So.2d 657 (Fla. 1985), destroyed Appellants' property right in an accrued cause of action and thereby violated his federal due process rights under the Fourteenth Amendment to the United States Constitution. It is especially clear here that this argument is without merit because, as this Court has held, there is no vested property right in a pending tort claim:
>
> > Our cases have clearly established that '[a] person has no property, no vested interest, in any rule of common law.' *Second Employers' Liability Cases,* 223 U.S. 1, 50, 32 S.Ct. 169, 175, 56 L.Ed. 327 (1912), quoting *Munn v. Illinois,* 94 U.S. 113, 134, 24 L.Ed. 77 (1877). The Constitution does not forbid the creation of new rights or the abolition of old ones recognized by the common law, to attain a permissible legislative object, *Silver v. Silver,* 280 U.S. 117, 122, 50 S.Ct. 57, 58, 74 L.Ed. 221 (1929), despite the fact that 'otherwise settled' expectations may be upset thereby. *Usury v. Turner Elkhorn Mining Co.,* 428 U.S. 1, 16, 96 S. Ct. 2882, 2829, 49 L.Ed. 2d 752 (1976) . . . Indeed, statutes limiting

liability are relatively commonplace and have consistently been enforced by the Courts.

Duke Power Company v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 98 S.Ct. 2620, 2638 n.32 (1978). As there is no vested property right in a pending tort claim there is no merit to Appellants' challenge under the Fourteenth Amendment.

Brief Appellee The Budd Company, P8

In the above appellee quotes verbatim footnote 32 *Duke Power Company v. Carolina Environmental Study Group, Inc.* supra. Neither *Duke Power* nor any of the cited cases support appellees flat statement that "there is no vested property right in a pending tort claim." Undoubtedly, if appellee so believes this to be true, appellee came to believe it from misapprehending what *Duke Power* and the cited cases hold, which is: that a right of action in a tort claim, at common law or by statute, may be abolished at any time, but not the accrued cause of action, which vested before the right created by statute or existing at common law was extinguished. In *Duke Power* the constitutionality of the Price-Anderson (Nuclear) Act was in issue; in *Second Employers' Liability Cases,* supra: the constitutionality of the Employers Liability Act; in *Silver v. Silver,* supra: the constitutionality of Guest Statute; in *Usury v. Turner Elkhorn Mining Co.,* supra: the constitutionality of Federal Coal Mine Health and Safety Act.[2]

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[2]Similarly, appellee The Budd Company's citation of *Pullum v. Cincinnati, Inc.,* 476 So.2d 657 (Fla. 1985) appeal dism'd., 160 S Ct 1626, 90 L.Ed. 2d 174 (1986) at page 9 of its brief is patently irrelevant and inappropriate because *Pullum's* appeal to this Court was set to challenging the constitutionality of the Florida statute of repose (Sec. 95.031 Fla. Statutes) which appellants do not nor ever have in any court. The destruction of appellants property rights in his accrued cause of action by retroactively applying *Pullum* is here, as it has been throughout in the Florida state courts, the sole matter of appellants cause to the courts.

In appellant's Jurisdictional Statement, at pages 7 and 8, we set out specific references to the decision of the U. S. District, N.D. Florida in *George v. Firestone Tire & Rubber Company,* supra, as the main body of Appellant's briefing of the federal question asserted. The arguments presented in appellees opposing briefs cite large numbers of cases (some 66 different cases) without ever directly addressing or rebutting the rationale of the *George* case.

The federal question herein is substantial in that the argument and cases relied upon by appellees evidence the kind of misinterpretations of questions of retroactivity which call for a decision of this Court to better make known how far and in what direction a court may go in applying any of its decisions retroactively without impermissibly depriving a citizen-person of his or her rights guaranteed by the Constitution of the United States and the decision of this United States Supreme Court.

CONCLUSION

For the foregoing reasons, it is respectively submitted that Appellant's Request That Papers Submitted Be Treated As Petition For Writ of Certiorari, and the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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No. 86-2041

In the

Supreme Court of the United States

OCTOBER TERM, 1986

EFFIE DELL CASSIDY, as guardian of the person of KENNETH CASSIDY, FLORIDA NATIONAL BANK, as guardian of the property of KENNETH CASSIDY, and SHARON CASSIDY, as wife of KENNETH CASSIDY,

Appellants,

v.

THE FIRESTONE TIRE & RUBBER COMPANY, a corporation, FORD MOTOR COMPANY, a corporation, and THE BUDD COMPANY, a corporation,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

APPENDIX TO JURISDICTIONAL REPLY BRIEF

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Excerpt

IN THE CIRCUIT COURT IN AND FOR
ESCAMBIA COUNTY, FLORIDA

CIVIL ACTION

EFFIE DELL CASSIDY, as guardian of the person of KENNETH CASSIDY, FLORIDA NATIONAL BANK, as guardian of the property of KENNETH CASSIDY, and SHARON CASSIDY, as wife of KENNETH CASSIDY,

Plaintiffs,

vs. Case No. 83-1934-CA-01

THE FIRESTONE TIRE AND RUBBER COMPANY, a corporation, and THE FORD MOTOR COMPANY, a corporation, and THE BUDD COMPANY, a corporation,

Defendants.

_____/

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

* * * * * * *

4. The Florida Supreme Court's recognition in *Florida Forest and Park Service* of the property rights existing in a party's cause is reinforced by courts in all jurisdic-

tions in their expression of the law. e.g. "existing actions constitute 'property' within the meaning of the constitutional guarantees", *Reid v. Solar Corporation,* 69 F. Supp. 626; (U.S. Dist. Ct. N.D. Iowa, 1946). "The right to recover damages for a personal injury, as well as the money recovered as damages, is property and may be regarded as a chose in action", *Harco v. Southern Pac R. Co., 62 P. 2d 443 (1 DCA Cal. 1936);* "A vested right of action is property in the same sense that tangible things are property", *Udall v. Mason,* 26 A. 2d 101 (Sup. Ct. Vt., 1942).

5. Very much akin to the law enunciated by the U.S. Supreme Court in *Chevron* are the cases (so numerous and well known to court as to be recognized by judicial notice without citation) in which the Supreme Court has consistently held that the taking of property or the denial of property rights in any of its varied forms without due process of law violates the Fifth Amendment of the U.S. Constitution. We submit that, on balance, the Florida Supreme Court would take this factor into account in any decision involving a question of retrospectivity/prospectivity stemming from Pullum.

* * * * * * * * *

s/

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Excerpt

IN THE DISTRICT COURT
OF APPEAL, FIRST
DISTRICT, STATE OF FLORIDA

EFFIE DELL CASSIDY, etc., et al,

Appellants,

v. Docket No. BK-198

THE FIRESTONE TIRE AND
RUBBER COMPANY, etc., et al,

Appellee,

_____/

NOTICE OF SUPPLEMENTAL AUTHORITY

Pursuant to Rule 9.210 (g) Florida Rules of Appellate Procedure, Appellant files the attached supplemental authority reflecting:

1. CS/HB832; 1986 Florida Legislature, Chapter 86-272, reflecting amendment to Florida Statutes 95.11(3), effective July 1, 1986.

2. *Thomas L. George and Tommie George, his wife, v. Firestone Tire and Rubber Company, et al,* Case No. CGA 85-0117-MMP, United States District Court, Northern District, Florida, Order dated June 13, 1986.

* * * * * * *

s/

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Excerpt

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

Docket No. BK-198
CASE NO. 83-1934-CA-01
FLA. BAR NO.: 338788

EFFIE DELL CASSIDY, as guardian of the person of KENNETH CASSIDY, FLORIDA NATIONAL BANK, as guardian of the property of KENNETH CASSIDY, and SHARON CASSIDY, as wife of KENNETH CASSIDY,

Appellants,

v.

THE FIRESTONE TIRE AND RUBBER COMPANY, a corporation and FORD MOTOR COMPANY, a corporation, and THE BUDD COMPANY, a corporation,

Appellees.

_____/

MOTION FOR REHEARING AND REHEARING EN BANC AND REQUEST FOR CERTIFICATION

COME NOW the Appellants, above-named, and THE ACADEMY OF FLORIDA TRIAL LAWYERS, as Amicus Curiae in Support of Appellants in the above-referenced appeal, and file this motion for rehearing and rehearing en banc and request for certification pursuant to Rules 9.030 and 9.331, Fla. R. App. P., from this Court's opinion dated September 23, 1986 and in support thereof would state as follows:

* * * * *

However, regardless of whether Appellants obtained a verdict or judgement, this Court failed to address the fact that Appellants' cause of action, when it accrued in February of 1982, vested in the Appellants the right to prosecute this cause of action. This Court has overlooked the argument of the Academy that Appellants' cause of action is a chose in action which is vested property interest subject to constitutional protections under both the Florida and U.S. Constitutions.

This Court overlooked and/or failed to address the ACADEMY'S citation of *Martinez v. Fox Valley Bus Lines,* 17 F. Supp. 576 (N.D. Ill. 1936); *Gregory v. Colvin,* 363 S. W. 2d 539 (Ark. 1963); *Faucheaux v. Alton Ochsner Medical Foundations Hospital and Clinic,* 470 So. 2d 878 (La. 1985); *Bush v. Reid,* 516 P. 2d 1215 (Alaska 1973); and *City of Cincinnati v. Hafer,* 49 Ohio St. 60, 30 N. E. 197 (1892) which support the position of Appellants and Amicus that the Appellants' cause of action is a vested property right which cannot constitutionally be vitiated without an alternative remedy or means of redress.

* * * * *

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Excerpt

IN THE SUPREME COURT OF FLORIDA

EFFIE DELL CASSIDY, as guardian of the person of KENNETH CASSIDY, FLORIDA NATIONAL BANK, as guardian of the property of KENNETH CASSIDY and SHARON CASSIDY, as wife of KENNETH CASSIDY, Petitioners, v. THE FIRESTONE TIRE AND RUBBER COMPANY, a corporation, FORD MOTOR COMPANY, a corporation, and THE BUDD COMPANY, a corporation, Respondents.	Case No. 69,668

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF PETITIONER ON JURISDICTION

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* * * * *

III.

MOREOVER, THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IS VIOLATIVE OF THE FIFTH AND FOURTEENTH AMENDMENTS OF THE U.S. CONSTITUTION AS GIVEN FULL FAITH AND CREDIT AND ADHERED TO BY THE FLORIDA SUPREME COURT

Petitioners cause of action is a vested property right which cannot be taken away without being violative of the Fifth and Fourteenth Amendments of the U.S. Constitution. See *George v. Firestone,* No. CGA 85-0117 MMP, N.D. Fla. June 13, 1986 (Paul, J.) at Appendix pages A-19-20, 23).

* * * * *